# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 12, 2014 |
| v | No. 314679<br>Oakland Circuit Court |
| JESSE ANTHONY COLLINS,<br><br>Defendant-Appellant. | LC No. 2010-233166-FH |

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of delivery of 50 or more, but less than 450 grams of heroin, MCL 333.7401(2)(a)(*iii*), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and conspiracy to deliver and/or possess with intent to deliver less than 50 grams of cocaine and/or heroin, MCL 333.7401(2)(a)(*iv*). *People v Collins*, 298 Mich App 458, 461; 828 NW2d 392 (2012). Defendant was sentenced "as a third-offense habitual offender, MCL 769.11, to concurrent terms of 10 to 40 years' imprisonment for each of his convictions." *Id*. In his first appeal, defendant challenged his convictions and sentences. *Id*. at 461-462. This Court vacated the conviction of delivery of 50 grams or more, but less than 450 grams, of heroin, MCL 333.7401(2)(a)(*iii*), affirmed his other crimes, and remanded the case to resentence defendant accordingly. *Id*. at 465-466, 471.

On remand, defendant was resentenced, as a third habitual offender, MCL 769.11, to 5 to 40 years for his convictions of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and conspiracy to deliver and/or possess with intent to deliver less than 50 grams of cocaine and/or heroin, MCL 333.7401(2)(a)(*iv*). We affirm.

In this appeal, defendant alleges that the trial court erred by failing to award him an additional credit of 143 days for the time he spent wearing a GPS electronic monitor ("tether"). We disagree.

"Whether a defendant is entitled to credit for time served in jail before sentencing is a question of law that we review de novo." *People v Armisted*, 295 Mich App 32, 49; 811 NW2d 47 (2011).

Pursuant to MCL 769.11b, a defendant is entitled to credit for time served:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Relying on MCL 769.11b, his guarantee against double jeopardy, and due process considerations, defendant contends that he is entitled to a credit for the time spent on a tether because he was subject to "virtual incarceration." The guarantee against double jeopardy protects a defendant from "(1) . . . a second prosecution for the same offense after acquittal; (2) . . . a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008). However, this Court has clearly held that "the Double Jeopardy Clauses of the federal and state constitutions, US Const, Am V; Const 1963, art 1, § 15, do not mandate an award of sentence credit for the time defendant spent in the tether program." *People v Reynolds*, 195 Mich App 182, 183-184; 489 NW2d 128 (1992). Further, this Court held that a defendant was not entitled to jail credit under MCL 769.11b because his "participation in the tether program was not due to his being denied or unable to furnish bond for the offense of which he was convicted . . . ." *Id*. at 183.

Defendant fails to cite any authority that supersedes either this Court's decision in *Reynolds*, or the similar holdings in *People v Whiteside*, 437 Mich 188, 196; 468 NW2d 504 (1991) ("[C]laimed credit is not authorized in the instant case unless defendant Whiteside served time 'in jail' prior to sentencing . . . ."), and *People v Wagner*, 193 Mich App 679, 682; 485 NW2d 133 (1992) (holding that a defendant was not entitled to sentence credit for time he spent in a boot camp program because he was not incarcerated). In reliance on the *Reynolds* decision, this Court recently held that "[t]he tether program is a restriction, not a confinement, and is not 'jail' as that term is commonly used and understood." *People v Pennebaker*, 298 Mich App 1, 7; 825 NW2d 637 (2012). Defendant's argument relies primarily on out-of-state cases, one of which has a state statute regarding credit for electronic monitoring. *Harris v Charles*, 171 Wash 2d 455, 463-464; 256 P3d 328 (2011). The cases cited by defendant are not binding on this Court. Furthermore, they are not instructive because MCL 769.11b omits language regarding credit for electronic monitoring or consideration of defendant's "virtual incarceration" concept. The language of MCL 769.11b is clear and unambiguous, contains no express language regarding electronic monitoring, and must be enforced as written. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). In light of the absence of statutory language for credit for electronic monitoring, defendant's argument must be directed to the Legislature. *People v McAllister*, 241 Mich App 466, 477; 616 NW2d 203 (2000).

Furthermore, defendant does not acknowledge or dispute that his GPS monitoring only restricted the time period between 12:00 a.m. and 6:00 a.m., and the predominant reason for the monitoring was to prevent him from contacting or being in the vicinity of witnesses. This restriction in movement does not constitute confinement of jail as set forth in MCL 769.11b. Therefore, defendant is not entitled to any additional credit for time spent on the tether, and the

trial court properly denied defendant's motion to amend his judgment of sentence following his resentencing.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood